United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1492 Signed

No. 74-1492

B P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

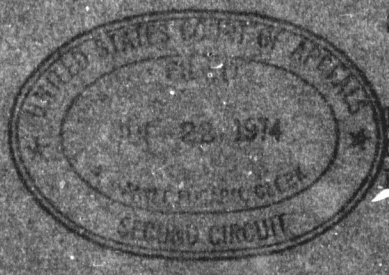
v.

SALVATORE CIRAMI AND JAMES CIRAMI,

Defendants-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



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STATEMENT OF THE ISSUES PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the district court improperly struck, on the Government's motion, a portion of Counts 1 through 15 and of Count 17 of the indictment.

STATEMENT OF THE CASE

In April, 1973, the defendants were charged by a federal grand jury sitting in the Eastern District of New York in 19 counts with crimes against the revenue (App. 1a, 3a-6a).[1/]

1/ "App." refers to the Appendix filed in this Court. "Tr." refers to the typewritten transcript of proceedings at the trial.

Counts 1 through 14 alleged that Salvatore Cirami and James Cirami were president and vice-president respectively of Air Package Distribution Service Ltd. (hereinafter referred to as "the corporation") during the period from January 1, 1967, to July 31, 1971; and that they did willfully attempt to evade and defeat a large part of the Federal Insurance Contributions Act (Social Security) taxes due and owing to the United States by filing false and fraudulent employer's quarterly tax returns substantially understating the total taxable wages paid employees in each of fourteen quarters during the aforesaid period, in violation of Section 7201 of the Internal Revenue Code (26 U.S.C. 7201) and 18 U.S.C. 2 (App. 3a-4a).

Counts 15 through 17 charged that the same defendants did willfully attempt to evade and defeat the Federal Unemployment Taxes of the corporation for the calendar years 1967, 1968, and 1969, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2 (App. 4a-5a). Counts 18 and 19 charged that defendants did counsel and advise the preparation of United States information returns (Form 1099) which were false and fraudulent as to a material matter in that they represented that the recipients of corporate funds were independent contractors when in fact they were corporate employees, in violation of 26 U.S.C. 7206(2) and 18 U.S.C. 2 (App. 6a).

After a jury trial before Judge Costantino both defendants were found guilty of 18 of the 19 counts of the indictment, Count 16 having been dismissed (App. 151a-152a). Defendant Salvatore Cirami was sentenced to pay a fine of $300 on each of Counts 1 through 15 and $100 on each of Counts 17 through 19, for a total fine of $4,800, and was placed on probation for two years (App. 151a). Defendant James Cirami was sentenced to pay a fine of $100 each on Counts 1 through 14 and $150 each on counts 15, 17, 18 and 19, for a total fine of $2,000, and was placed on probation for two years (App. 152a).

The central issue at the trial was whether the corporation's truck drivers were employees of the corporation or independent contractors (Tr. 447-449). The evidence to support the verdict may be summarized as follows:

Air Package Distribution Service, Ltd. (formerly known as Air Freight Haulage, Inc.), is a trucking company which provides pick-up and delivery service to airlines (Tr. 141, 298). During the prosecution years it was operated by Salvatore Cirami, the president of the corporation, and his son, James Cirami, the vice-president (Tr. 297, 298-299). An investigation by special agents of the Internal Revenue Service for the years 1967 through 1970 disclosed that the salaries of truck drivers were not reported in the periodic tax returns filed by the corporation in connection with Federal Insurance Contribution Act (Social Security) taxes and Unemployment Compensation taxes (Tr. 142). All of the

corporate books and records treated all the truck drivers as independent contractors (Tr. 17), and a Treasury agent making an investigation would not be able to tell from those books and records that there was anything wrong; he would have to go beyond the records (Tr. 179-180).

It was stipulated that one Friedman, an employee of the Edwards Employment Agency, if called to the stand, would testify that he had dealt with both defendants for many years and that during the prosecution years he had sent about 30 truck drivers to the defendants for jobs (Tr. 40-41).

Irwin Strahl testified that he is a truck driver and has been since 1957; that during those years he worked for about six companies; that from about the end of 1966 to October, 1969, he worked as a truck driver for defendants; that he was hired by Salvatore Cirami, who advised him that "it would be a more-or-less a contracting job" and that no deductions would be withheld from his salary for Social Security or Unemployment Compensation taxes; that it was a five-day-a-week job, although he did work some Saturdays; and that it was his job to pick up and deliver freight from New York City or Brooklyn (Tr. 42-44). When asked how he knew what to do on a particular day, Strahl replied that there was usually somebody on the corporation's loading dock who would show him what work had to be done that day, and that most of the time there was a dispatcher there who told him what to do (Tr. 44-45). He stated that he usually punched a time clock and got extra pay for working Saturdays (Tr. 45). Strahl testified that he was a member of the union

and had pension and welfare rights as a member, which were paid for by Salvatore Cirami (Tr. 45)[2/]; and that the company paid for his vacation time (id). Strahl further testified that it was explained to him that it would be considered that he was leasing a truck from the corporation and that he usually, but not always, had the same truck assigned to him in the mornings. The truck was always at the defendants' place of business, and would be assigned to him either by Salvatore Cirami or James Cirami (Tr. 46-47). He said he could not remember the terms of the lease but that the name of the defendants' corporation was painted on the doors of the truck and that he had to wear a uniform which had the corporate name on the front (Tr. 50-51). Regarding the truck, Mr. Strahl testified that he did not pay for any insurance and that the defendants' corporation paid for the gasoline and reimbursed him for the tolls (Tr. 51). If the truck would break down he would call the defendants and they would get in touch with a towing company (Tr. 51-52). He worked full-time for the defendants and did not work for anyone else during this period of time (Tr. 52).

Government Exhibit 15, the agreement between Strahl and the corporation which supposedly took effect in 1967, provided that the trucker (Strahl) would be responsible for all costs incurred in the performance of services to the corporation except tolls, that all cargo insurance and personal injury and property damage

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2/ Some of the truck drivers were members of the union (Local 295) and some were not (Tr. 122).

insurance would be provided by the trucker (Tr. 53). Strahl testified, however, that he did not bear the costs of operating the truck or any of the insurance; and that the corporation paid for all of that (Tr. 54).

Some time during the prosecution years the "contract" form usually signed by truckers coming to work for the corporation (Govt. Ex. 15) was revised (Govt. Ex. 1). The lawyer who drew up the new contract admitted that he had never been asked for an opinion as to whether the corporation's truck drivers were independent contractors rather than employees (Tr. 347).

James Lynch testified that he had worked for the defendants as a truck driver; that he was hired as a result of an advertisement defendants placed in a newspaper saying that they needed a truck driver; that when he was hired James Cirami explained to him that he would be "more or less self-employed" and would be responsible for "taxes and Social Security and a health plan" (Tr. 66-67). Lynch further testified that he was supposed to work five days a week on a full-time basis; that he punched a time-clock[3/] and was assigned different trucks on different days; that the cost of operating the trucks, including insurance, was paid for by the defendants' corporations; and that he was assigned to his particular jobs by a dispatcher (Tr. 68-70).

3/ It was stipulated that Government Exhibit 2 is a representative sample of time cards used by the defendants in their company and that the drivers would punch them (Tr. 41).

Billy Anderson testified that he worked for the defendants as a truck driver from November, 1966, through July, 1969 (Tr. 74); that he was hired by Salvatore Cirami (id.); that taxes were not taken out of his pay because he was considered an "independent contractor" (Tr. 75-77); that work was assigned to him at defendants' place of business each day by a dispatcher; that he (Anderson) did not pay for any insurance on the truck nor the cost of operating the truck, except for tolls, for which he was reimbursed by the corporation (Tr. 77-80); and that the truck he was assigned to depended upon the nature of the particular run (Tr. 80).

Paul Fleischer testified that he worked for the defendants as a truck driver from 1968 to 1971; that he got the job through the Edwards Employment Agency and was hired by Salvatore Cirami, who explained to him that he would be an "owner operator" (Tr. 88); that the work was assigned to him each morning by the dispatcher; that in the beginning he punched a time clock; that soon after he started working for the defendants he got one week's paid vacation; and that he understood that as an owner operator he would have to pay his own employment taxes (Tr. 87-92).

An employee of the Welfare and Pension Fund of Local 295 (a union which "has to do with the air freight haulers" (Tr. 194)) testified that as office manager of the fund she accepted remittance forms sent in by employers who sent so many dollars

per week per employee for certain welfare and pension benefits; that in order for truck drivers to receive these benefits they had to be employees (Tr. 194-195); that employers had to fill out a certain form to cover their employees for disability benefits (Tr. 197); and that Salvatore Cirami, on behalf of the corporation, signed and filed such a form on May 18, 1969 (Tr. 201).

A payroll auditor for the corporation's insurance company testified that when he audited the books for the period May, 1966, through May, 1968, he raised the question of the absence of truck drivers and Salvatore Cirami advised him that the corporation hired independent truckmen who worked for his corporation as well as other companies (Tr. 211-212).

Regarding the taxes due and taxable wages unreported, the following stipulation was read into the record by the prosecutor (Tr. 158-159):

> The defendants' attorney, Mr. Hollman, and I have stipulated that if he (Mr. Miller--the Government's summary witness) would have continued his examination, he would have said that he determined that the figures, the amounts listed in the Indictment, are the figures that he would have come to; that there was a tax liability; and that the reason for that is that all truckers were classified as independent contractors and the IRS believes that they should be classified as employees.

The unreported taxable wages subject to Federal Insurance Contributions Act taxes during the period January 1, 1967 through June 30, 1970, as alleged in the indictment, were in excess of $330,000 (App. 3a-4a). The unreported taxable wages subject to Unemployment Compensation Act taxes for the year 1967, as alleged in the indictment (Count 15), were $61,141.10 (App. 4a). The figure for the year 1969, as alleged in the indictment (Count 17), was $65,252.25 (App. 5a).

On the central issue in the case, whether the truck drivers were employees or independent contractors, the trial court instructed the jury as follows (Tr. 447-450):

> Every individual is an employee if the relationship between him and the person for whom he performs service is the legal relationship of employer and employee.
>
> Such a relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case are the furnishing of tools and the furnishing of a place to work to the individual who performs the services.

The following factors may be weighed in reaching your conclusion as to whether the drivers were employees. Any single fact, or small group of facts is not conclusive evidence of the presence or absence of control. All facts must be weighed and the conclusion must be based on a careful evaluation of all the facts and the presence or absence of factors which point to an employer-employee relationship.

The existence of a continuing relationship between an individual and the person for whom he performs services is a factor tending to indicate the existence of an employer-employee relationship.

The establishment of set hours of work by the employer is a factor indicative of control.

If the worker must devote his full time to the business of the employer, the employer has control over the amount of time the worker spends working and impliedly restricts him from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he chooses.

Payment for work by the hour, week or month is usually the manner for paying employees; whereas payment on a commission or job basis is customary where the worker is an independent contractor.

The furnishing of tools or materials by the employer is indicative of control over the worker.

A person who is in a position to realize a profit or suffer a loss as a result of his services is generally an independent contractor, while the individual who is an employee is not in such a position.

The fact that a person makes his services available to the general public, that is, for example, by hanging a "shingle", advertising or having a business telephone listing, is generally an independent contractor, while if he doesn't he is an employee.

> Whether the employer has the right to discharge and the worker has the right to quit at any time without incurring any liability is indicative of an employer-employee relationship.
>
> Lastly, an independent contractor usually agrees to complete a specific job and he is responsible for its satisfactory completion or is legally obligated to make good for failure to complete the job.

* * *

SUMMARY OF ARGUMENT

I

There is no merit in the various attacks made by defendants on the sufficiency of the evidence to support the verdict of guilty. The central issue before the jury was whether the truck drivers were employees of the corporation or independent contractors. If they were employees the primary defense would be disposed of and the jury would have little difficulty in concluding that the policy and practice of the corporation of having the drivers masquerade as independent contractors resulted from the carrying out of a long-term tax evasion scheme designed to save the corporation from paying employment taxes. On the central issue the evidence detailed in our Statement of the Case, even without argument, was sufficient to warrant the jury's inference that the drivers were not independent contractors but employees.

The evidence as to James Cirami was ample. While he was apparently not the originator of the tax evasion scheme, it is clear that he took an active part in it during the years in question, serving as vice-president and secretary of the corporation and being active in the conduct of its business. James Cirami signed the formal agreements under which the truck drivers masqueraded as independent contractors, as well as about 90% of the F.I.C.A. tax returns. James' father, Salvatore Cirami, went to Puerto Rico in 1968 or 1969 and left James in sole charge of the business from then on.

Defendants' miscellaneous attacks on the sufficiency of the evidence are without substance for reasons stated hereinafter.

II

There is no merit in the argument that the court below committed reversible error in striking a portion of the charges from Counts 1 through 15 and Count 17 of the indictment. The clause in question alleged that the amount of the employment tax understated on each of the sixteen tax returns in question was owed to the United States by the defendants rather than by their corporation. This was an obvious error in drawing the indictment which could not have misled the defendants as to the nature of the charges. It was apparent from the beginning that the defendants were not personally liable for corporate debts.

The gist of the offense alleged in these counts was not that a certain amount of money was owing to the Government, but that defendants had willfully attempted to evade certain taxes by filing false tax returns. Defendants' argument relies heavily upon Ex parte Bain, 121 U.S. 1. The rule laid down there was that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. However, if the change is merely a matter of form, or in the nature of striking surplusage, it may be made without the concurrence of the defendant. Omission of an allegation, like that in the instant case, that the "manner" of attempted evasion was the filing of a false return would not affect the validity of the indictment, since it followed the language of the statute, 26 U.S.C. 7201. A fortiori, the stricken clauses constituted mere surplusage. We submit that this case comes within the rule that a portion of an indictment that is merely surplusage may be ignored whether the defendant agrees or not.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT

There is no substance in the defendants' various arguments (Br. 7-19) that the evidence was insufficient to support the jury's verdict of guilty. The central issue before the jury was whether the truck drivers doing work for the corporation were employees or independent contractors. On this issue the evidence clearly indicated that the drivers were not independent contractors but, as the Government claimed, employees. The evidence is so clear, indeed, that is is hardly necessary even to argue it. All one needs to do is to read the foregoing Statement of the Case to see that the Government's position is amply supported. Pointing to the drivers' status as employees under the control of the corporation, and not as independent contractors, were the facts that they worked a regular five-day week, with overtime being paid for Saturday work; that they punched a time-clock; that they were directed what to do each day by a corporate dispatcher; that some of them were union members and had pension and welfare rights; that they were given paid vacations; that their trucks were assigned to them by Salvatore or James Cirami; that the name of the corporation was painted on the doors of the truck and appeared on the uniform worn by the truck drivers; that the drivers did not pay for any insurance; that the corporation paid for the insurance and

gasoline and reimbursed the drivers for tolls; and that if a truck would break down the drivers would call defendants, who would get in touch with a towing company. All of these factors were wholly consistent with the Government's contention that the truck drivers were employees, and wholly inconsistent with the defendants' argument that they were independent contractors. Thus there was ample evidence to support the jury's finding on the critical question of the status of the drivers. Defendants' specific arguments in this Court to the contrary (Br. 15-16) are based on viewing the evidence in the light most favorable to themselves, which of course is not a correct approach at this stage of the case, in view of the jury's verdict against them. As for the query (Br. 16-17) as to why the Internal Revenue Service did not raise the question of the drivers' status between 1958 and 1965, the testimony was that all of the corporate books and records treated all of the truck drivers as independent contractors (Tr. 17), and a Treasury agent making an investigation would not be able to tell from those books and records that there was anything wrong; he would have to go beyond the records (Tr. 179-180). It does not appear that any investigator did so prior to the inquiry that led to the present indictment.

Defendants make several miscellaneous contentions regarding the sufficiency of the evidence which should be commented on. They argue (1) that there is insufficient evidence against James Cirami (Br. 7-10); (2) that there were no taxes due and owing because no assessment of the taxes had been made (Br. 11-14; (3) that Counts 18 and 19 should not have gone to the jury (Br. 18-19); and (4) that Counts 8 and 10 should not have gone to the jury (Br. 19). We shall discuss these contentions, none of which has merit, seriatim.

(1) There was ample evidence to support the verdict against James Cirami. While he was apparently not the originator of the tax evasion scheme, it is quite clear that he took an active part in it during the years in question. He was active in the business, serving as vice-president and secretary of the corporation during those years. It was stipulated that a representative of an employment agency, if called to the stand, would testify that he had dealt with both defendants for many years and that during the prosecution years he had sent about 30 truck drivers to defendants for jobs. (supra.) James Lynch, a driver testified that he was hired by the corporation as the result of a newspaper advertisement, and that James Cirami explained to him that he would be "more or less self-employed" and would be responsible for "taxes and Social Security and a health plan". (Supra.) As the defense conceded (Tr. 259), James Cirami signed the formal agreements (Govt. Ex. 15) under

which the truck drivers working for the corporation were masquerading as independent contractors. James Cirami also signed about 90% of the Forms 941 (F.I.C.A. tax returns). He could not have failed to know what was going on around him on a matter as important as this. Finally, Salvatore Cirami went to Puerto Rico in 1968 or 1969 and left James Cirami in charge of the business from then on (Tr. 316). If he was conceivably no more than an aider and abettor before that time (18 U.S.C. 2), James was clearly the prime mover in the tax evasion scheme after that time.[4/]

(2) Equally without substance is the argument (Br. 11-14) that there were no taxes due from the corporation because no assessment of taxes had been made by the Internal Revenue Service. For this proposition defendant relies upon United States v. Moody, 339 F. 2d 161 (C.A. 6, 1964), certiorari denied, 386 U.S. 1003; and United States v. England, 347 F. 2d 425 (C.A. 7, 1965). The Moody case furnishes no support at all for defendants' position. The England case is clearly not in point because it involved an unusual prosecution for willful attempts to evade payment of taxes, while the instant prosecution is merely for willful attempts to evade the assessment of taxes. The difference is important. Sansone v. United States, 380 U.S. 343, 354 (1965). It has been held repeatedly that in the usual

4/ Where the defense puts evidence into the record the prosecution is free on appeal to seek support for the jury's verdict in the evidence of both sides. United States v. Calderon, 348 U.S. 160, 164 (1954).

prosecution for tax evasion (i.e., where--as here--the attempt is directed at evading the assessment of tax rather than the payment thereof) the making of an assessment by the Internal Revenue Service is not a condition precedent to criminal prosecution. Ford v. United States, 233 F. 2d 56, 58-59 (C.A. 5, 1956), certiorari denied, 352 U.S. 833; Guzik v. United States, 54 F. 2d 618, 619 (C.A. 7, 1931), certiorari denied, 285 U.S. 548; United States v. Commerford, 64 F. 2d 28, 30 (C.A. 2, 1933), certiorari denied, 289 U.S. 759.

(3) There is no substance in the contention (Br. 18-19) that Counts 18 and 19 should not have gone to the jury because the Forms 1099, information returns, were prepared and caused to be filed by the corporation's accountant, Johnson, rather than by the defendants themselves. These counts alleged (App. 6a) that defendants did aid and assist in, counsel, procure and advise the preparation and presentation to the Internal Revenue Service of the Forms 1099, indicating falsely that the truck drivers were independent contractors rather than employees. Clearly, the fact that Johnson did the actual preparing and filing of these returns is immaterial to the charge that defendants counselled, procured and advised their preparation and filing (26 U.S.C. 7206(2). The jury was entitled to consider that the preparation and filing of these information forms (rather than the W-2 forms usually given to employees) was part and parcel of the whole tax evasion scheme set into motion and perpetuated by the defendants. If the truck drivers were

considered to be independent contractors, the Forms 1099 were generally accurate and agreed with the corporation's books and records (Tr. 175-176).

(4) There is no merit in the contention (Br. 19) that Counts 8 and 10 should have been dismissed because the employer's quarterly tax returns (Forms 941) which were the subject of those counts were unsigned. That is a mere technical defect which does not alter the fact that the Forms 941 in question, if not technically returns, were documents purporting to be returns, and were filed in the usual course of business and intended by defendants to be accepted as returns by the Internal Revenue Service. Moreover, defendants make no argument that this contention was preserved by reason of its having been timely raised at the trial.

II

THE COURT BELOW DID NOT ERR IN STRIKING A PORTION OF COUNTS 1 THROUGH 15 AND 17 OF THE INDICTMENT

Defendants contend (Br. 4-6) that the court below committed reversible error in striking a portion of the charges from Counts 1 through 15 and Count 17 of the indictment. The contention is without merit.

The clause in question (App. 3a-5a) alleged that the amount of the employment tax understated on each of the sixteen tax returns in question was owed to the United States by the defendants rather than by their corporation. This was an obvious error which could not have misled the defendants as to the nature of the charges. It was apparent from the beginning that the

defendants were not personally liable for corporate debts. The gist of the offense alleged in these counts was not that a certain amount of money was owing to the Government, but that defendants had willfully attempted to evade certain taxes by filing false tax returns. The question here boils down to whether what the trial judge did amounted to a mere striking of surplusage from the indictment or to a basic alteration in the nature of the charges. If it was the former, the action was proper, even though the defendant did not concur in it.

Defendants' argument is built around Rule 7(d) of the Federal Rules of Criminal Procedure and the case of Ex parte Bain, 121 U.S. 1. "The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." Stirone v. United States, 361 U.S. 212, 217. In the Bain case "there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to the grand jury." United States v. Brims, 272 U.S. 542, 549. The "underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." Russell v. United States, 369 U.S. 749, 770, and cases cited. However, withdrawing a part of a charge from the consideration of a jury does not work

an amendment of the indictment, Salinger v. United States, 272 U.S. 542, 548-549, provided nothing is thereby added to the indictment, Overstreet v. United States, 321 F. 2d 459, 461 (C.A. 5, 1963); United States v. Griffin, 463 F. 2d 177, 178 (C.A. 10, 1972). A portion of an indictment that is merely surplusage may be ignored whether the defendant agrees or not. Ford v. United States, 273 U.S. 593, 602. What we have here is a mere striking of surplusage, not a change in the nature of the charges.

An indictment is sufficient if it charges a crime in the language of the statute (in this case 26 U.S.C. 7201), United States v. Lepowitch, 318 U.S. 702, 704; Ekberg v. United States, 167 F. 2d 380, 387 (C.A. 1), leaving further details of the charge to be furnished in a bill of particulars Hence, omission of an allegation, like that in the instant case, that the "manner" of attempted evasion was the filing of a false return would not affect the validity of the indictment under Section 7201 or its predecessor, Section 145(b) of the Internal Revenue Code of 1939 Hayes v. United States, 407 F. 2d 189, 192 (C.A. 5, 1969); Heasley v. United States, 218 F. 2d 86, 88-89 (C.A. 8, 1955), certiorari denied, 350 U.S. 882; United States v Rosenblum, 176 F 2d 321, 324 (C.A. 7, 1949). A fortiori, the striking of the final clause in each count, relating to the amount of tax owing and by whom it was owed, did not work a fundamental change in the charges. In these circumstances, we

submit, the case comes within the rule that a portion of an indictment that is merely surplusage may be ignored whether the defendant agrees or not. Ford v. United States, supra, 273 U.S. at 602.

CONCLUSION

For the reasons stated, the judgment of conviction should be affirmed.

Respectfully submitted,

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JULY, 1974.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 9th day of July, 1974, in an envelope, with postage prepaid, properly addressed to him as follows:

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